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Case No. _____

IN THE

# Supreme Court of the United States

October Term, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT

*Petitioners,*

—vs—

STATE OF OHIO

*Respondent.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. In a state criminal prosecution for pandering obscene materials, where the materials are arguably protected by the First Amendment of the United States Constitution, and where the defendant, in raising a defense of discriminatory enforcement of the law, has presented evidence that he has been singled out for prosecution and that the prosecution was based upon the desire to prevent his exercise of constitutional rights, has a prima facie case of unconstitutional discriminatory enforcement been presented and does the state then have the burden of rebutting the prima facie showing to avoid a finding of discriminatory enforcement?

2. In a state criminal prosecution for pandering obscene materials, where a trial court, after weighing the evidence presented, including the credibility of the witnesses, finds that unconstitutional discriminatory enforcement has been proven, does an appellate court's reversal of that finding because of

the appellate court's failure to accept the trial court's determination of credibility of portions of the principal witness's testimony, contrary to a well-established rule of review, deny the defendant equal protection of the law?

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioners Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt pray that a writ of certiorari issue to review the judgment of the Ohio Supreme Court which affirmed the judgment of the Ohio Court of Appeals, Eighth Appellate District. The judgment of the Ohio Supreme Court, thus, affirmed the reinstatement of the prosecution for pandering obscenity brought against petitioners by the court of appeals, following dismissal of those charges by the Municipal Court for Cleveland, Ohio.

## OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 63 Ohio St. 2d 132. The text of that opinion is set forth in the Appendix at 1-18a. The opinion and journal entry of the Ohio Court of Appeals, Eighth Appellate District is unreported and is set forth in the Appendix at 19-35a. The opinion of the Municipal Court of Cleveland, Ohio, is

unreported and is set forth in the Appendix at 36-39a.

## JURISDICTION

The judgment of the Ohio Supreme Court affirming the judgment of the court of appeals was entered on July 16, 1980.

This petition seeks review of a final judgment rendered by the highest court in the State of Ohio in which a decision could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because rights, privileges and immunities under the Constitution of the United States are claimed to have been violated.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First Amendment and the pertinent portion of the Fourteenth Amendment to the United States Constitution is set forth in the Appendix at 43a. The text of the Ohio Revised Code §§2907.01 and 2907.32 are set forth in the Appendix at 44-50a.

## STATEMENT OF THE CASE

On May 17, 1977, the Cleveland Municipal Court granted the motion of the defendants to dismiss the misdemeanor complaints which constituted prosecutions for pandering obscenity in violation of Section 2907.32 of the Ohio Revised Code (see Opinion of Municipal Court, Appendix at 39a). The subject of the prosecution was the publication of the widely read and nationally known and distributed (T. 90-91) magazine, Hustler. The basis for the trial court's ruling was its agreement with defendants' well-supported argument that the complaints represent selective and discriminatory prosecution and therefore, violate the equal protection provisions of the Fourteenth Amendment.

The dismissal was based upon an evidentiary hearing conducted on February 28, 1977, during which the trial judge had the opportunity to hear and weigh the testimony of Bruce A. Taylor, the assistant law director who had been in charge of the City of

Cleveland's obscenity prosecutions for two years (T. 8-9), and of Steven Nemeckay, a member of the Cleveland Police Department's Bureau of Inspection, Special Investigations Unit, obscenity detail (T. 136-137).

Assistant Law Director Taylor[1/] testified that since the Mayor's police unit on obscenity was formed in April of 1973, the City had initiated between 500 and 550 obscenity prosecutions (T. 9-10). Materials were selected for prosecution largely upon the instructions given to the police by witness Taylor in his capacity as prosecutor of these cases (T. 14). His general instructions to the police were that applicable Supreme Court decisions prohibited the sale of "obscenity which is hardcore." (T. 14). He "defined to them what [he] though hardcore meant." (Ibid.) This definition

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1/ This witness had been directly involved in obscenity prosecutions for the City over four years, first as a law student, then as an assistant prosecutor, and finally, as an assistant law director (T. 8-9).

referred to "actual instead of simulated acts of sex, and where ejaculation et cetera, is shown...." (Ibid.) Accordingly, enforcement concentrated on "what we call adult bookstores and theaters" where such materials are purchased (Ibid.).

At the direction of Assistant Law Director Taylor, the police were to seize the "most explicit of the material available." (T. 16). Explicit meant "actual photographs of penetration where it is clearly shown and not just in position" (ibid.) or bizarre depictions of "bestiality, masochism, bondage and sado-masochism" (T. 17), all of which had "sexual conduct clearly shown." (Ibid.) His instructions were carried out by the police (T. 16).

During the two years of witness Taylor's tenure as supervisor of obscenity prosecutions, there had been no actions initiated against paperback books or unillustrated materials (T. 19-20). Consistent with his guidelines, virtually all prosecutions

involved works displaying explicit sexual activity (T. 30, 31). In the judgment of the prosecutor and the police, all the prosecuted materials were devoid of any serious or redeeming commentary (T. 24-25, 36). Moreover practically every publication[2/] contained more than mere frontal nudity. In a startling admission, witness Taylor acknowledged "[w]e had never prosecuted a magazine like Hustler" (T. 86).

The proof at the hearing[3/] demonstrated that Hustler follows the format and basic philosophy of a number[4/] of nationally known

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2/ Except a magazine containing nude photographs of children (T. 31), and a vague allusion to a newspaper format publication called "Screw" which the witness could not recall showing actual penetration (T. 47).

3/ The July and August 1976 issues which were the subject of the prosecution were identified before the court during the hearing, and the witness testified as to what he could see in the magazine (T. 57, et seq.); however, at the prosecutor's request, they were not marked as exhibits.

4/ Perhaps as many as 50 or 75 (T. 93-94).

men's or adult magazines sold in the Cleveland community, such as Playboy, Club, Penthouse, Gallery, Genesis, Oui, Cavalier, Swank, Stud and Dude (T. 88-89, 90-91, 93, 122). Hustler contains editorials, motion picture reviews, feature articles, contemporary fiction, interviews and special commentaries dealing with various sexual subjects. The magazine publishes pictures of women in the nude with the genitals fully exposed but, as testified to by witness Taylor, there are no pictures of explicit sex acts so as to bring Hustler squarely within the policy of Taylor's office. (T. 58-59).

Witness Taylor testified at some length concerning the content of the July issue of Hustler (T. 57-88), and concurred that the August issue was similar (T. 102). He admitted telling a television interviewer that the prosecution was launched because of a political cartoon (T. 54) which was the subject of complaints to the police (T. 54-55). In apparent contradiction, he denied that

the defendants were charged because of that cartoon, but admitted that he had publicly indicated the cartoon was a reason the magazine had been singled out for prosecution (T. 55). Taylor urged that a depiction of Uncle Sam with his pants down also contributed to the decision to prosecute, but confessed that his basis for this judgment was merely the nudity in the cartoon (T. 66).

As described by witness Taylor, the July issue of Hustler contained many features, cartoons, pictures and stories which of themselves were not obscene (T. 69-70, 73, 75, 76). However, he pointed to "dirty jokes" (T. 78), pictures of dolls in relation to sexual activities (T. 80), a cartoon showing simulated sexual intercourse (T. 82), and exhibitions of genitals (T. 83) as supporting his conclusion that the magazine, taken as a whole, was obscene (T. 82). Nevertheless, in a display of candor, Taylor testified that he had never prosected magazines devoted solely to frontal nudity (T. 84, 87), solely

to stories dealing with sex (T. 87), solely to cartoons (T. 87-88), or solely with reviews of X-rated materials (T. 88).

When questioned on the comparisons between Hustler and the other national men's magazines widely sold throughout the area, witness Taylor agreed that the others, like Hustler, contained pictures of nude women with exposed genitals (T. 95), stories dealing with sex (ibid.), and "advise and consent" columns answering reader's questions about sexual problems (ibid.). He concurred that Hustler followed the format of these other magazines (ibid.) and that some of the others such as Club and Gallery show scenes of simulated sexual intercourse (T. 95-96).

The testimony further established that articles on the various sexual aberrations mentioned in Hustler also appeared in these other magazines (T. 36). He conceded that, excluding Playboy, the other magazines were "comparable to Hustler," and that the pictures were "pretty much the same" (T. 98);

that, in fact, at least Club's pictures were "stronger." (Ibid.)

Turning to the differences between Hustler and the other magazines, witness Taylor opined that the stories in Penthouse "seem to be a little better written as far as literary words" (T. 99). However, when asked whether there were differences in content he acknowledged that they "still describe the same thing...." (Ibid.)

In sum, witness Taylor's differentiation between Hustler and the other nationally distributed men's magazines merely rested on his opinion that Hustler's jokes were more shocking (T. 98), its stories less well written (T. 99) and of "lower mentality" (T. 99), and its cartoons[5/] more sexually

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5/ Witness Taylor did not know whether the cartoons in Hustler were "more tasteless" than those of various other men's magazines (T. 100). He felt that the "Happy Hooker" series in Hustler, though similar in length to Playboy's "Annie Fannie" and Penthouse's "Wicked Wanda", showed more sex than the others (ibid.).

oriented (T. 101).

Prior to the hearing (T. 105), the City of Cleveland had not only commenced the instant prosecution against Hustler, it had also brought a civil injunction suit against the magazine in the Cuyahoga County Common Pleas Court.[6/] Taylor's office expressly threatened sellers of the magazine that if Hustler were deemed obscene, its sale would be a violation of law (T. 166-167). A letter was sent by the prosecutor's office to the George Klein News Co., distributor of Hustler, advising of the City's intention to prosecute the dissemination of the magazine (T. 103-105).

The singular most important fact to come out of the February 28 hearing was that Assistant Law Director Taylor had never initiated either criminal (T. 108) or civil (T. 104) proceedings against any of the other men's magazines. The record established that

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[6/] No. 959,230 on the civil docket.

the police and the prosecutor's office knew of and actually examined other magazines (T. 106), but did not open any files on them (T. 107), or take any steps toward prosecution of them (T. 106). There were no seizures of other magazines (T. 108), and Officer Nemeckay conceded that he had not even started steps preliminary to such action (T. 167-168). No mention of other magazines was made in the prosecutor's communications with the George Klein News Co. (T. 104).

The Assistant Law Director confessed that "public reaction" and "what the community feels about what we're doing" were factors in his decision of whether to prosecute Hustler or other magazines (T. 115-119). However, he feebly attempted to explain away these remarks by stating that publicity causes the cases to be more "drawn out" (T. 118).

The trial court, after weighing all of the evidence, including the credibility of the witnesses, found that:

(1) Cleveland's obscenity prosecutions were based on guidelines limited to hard core pornography (Opinion of Municipal Court, Appendix at 37a);

(2) The magazines prosecuted to date were sold only in "adult" book stores (ibid.);

(3) Other magazines generally available throughout the community contained some hard core material and were not prosecuted (ibid.);

(4) Hustler did not contain hard core material (ibid.);

(5) Other magazines similar to Hustler were actually available at the same locations and were not being prosecuted (ibid.).

The trial court did not attach significance to the fact that this was the "first prosecution of this type of magazine or of this type of defendants" (Opinion of Municipal Court, Appendix at 38a). However, the Court specifically noted that "no other similar prosecutions had been initiated either prior or subsequent to the charges filed in this case in July of 1976." The Judge was speaking as of May 17, 1977. The Court stated that:

> "[i]f there are, as the evidence clearly indicates, other magazines, similar in content to the magazines in question, then to select and prosecute this magazine only presents a serious constitutional question."

The charges were dismissed on the trial judge's finding that the testimony supported defendants' allegations of discriminatory prosecution.

However, the court of appeals, after reviewing the cold record without the opportunity of assessing the credibility of the witnesses, determined that there had not been a showing of unlawful discriminatory prosecution. Despite the prosecutor's admission that an immodest political cartoon was the reason Hustler magazine had been singled out for prosecution (T. 54), the court of appeals chose to believe the prosecutor's subsequent apology that the prosecution was a test case and to override the court below. Despite Assistant Law Director Taylor's admissions that he had handled all obscenity prosecution for the City for the past two years (T. 8),

that during that time the Chief Prosecutor had left decisions on whether to prosecute to Taylor's discretion (T. 19) and that Taylor had made the decision to prosecute Hustler, the Court of Appeals held that the petitioners should have "presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format [as Hustler]." (Opinion of Court of Appeals, Appendix at 31a), because Taylor had claimed, contrary to his earlier assertions of authority, that he couldn't make the decision on whether to prosecute other magazines similar to Hustler (Opinion of Court of Appeals, Appendix at 30-31a). Because the defendants failed to present plenary proof that other magazine publishers wouldn't be prosecuted, the court of appeals held that defendants failed to meet their heavy burden of proof, rather than shifting the burden to the prosecution to rebut the defendant's case.

On appeal to the Ohio Supreme Court, petitioners urged that after having presented a prima facie case of discriminatory prosecution, the burden should have shifted to the prosecution to rebut that showing (Appendix at 51a). However, the Ohio Supreme Court affirmed the judgment of the court of appeals and held that:

> "In order to sustain their burden, the defendants needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions." 63 Ohio St. 2d at 136, Appendix at 9a.

In a strong dissent, Justice Paul W. Brown urged that the defendants had sustained their burden of proof (63 Ohio St. 2d at 136, Appendix 10a) and that the majority had selectively adopted testimony to support the prosecutor's "test case" argument (63 Ohio St. 2d at 137, Appendix 13a). Justice Brown pointed out that Taylor's denial of authority to pursue other prosecutions was contradicted by Taylor's claim that he "possessed the exclusive delegated authority to select which

cases to prosecute and that he alone had made the decision to pursue Hustler" (63 Ohio St. 2d at 137, Appendix at 12a).

## REASONS FOR GRANTING THE WRIT

### AN IMPORTANT QUESTION FOR REVIEW, NOT PREVIOUSLY DECIDED BY THIS COURT, IS PRESENTED BY THIS CASE CONCERNING WHETHER IN A CRIMINAL PROSECUTION FOR THE DISTRIBUTION OF MATERIALS WHICH ARE ARGUABLY PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, WHERE THE DEFENDANT HAS PRESENTED A PRIMA FACIE CASE OF UNCONSTITUTIONAL DISCRIMINATORY PROSECUTION, THE STATE THEN HAS THE BURDEN OF REBUTTING THE PRIMA FACIE SHOWING TO AVOID A FINDING OF DISCRIMINATORY PROSECUTION.

This Court has long recognized that discriminatory enforcement of criminal laws constitutes a denial of equal protection of the law, Yick Wo v. Hopkins, 118 U.S. 356 (1886), Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961). However, in order for selective enforcement of the law to be construed as an unconstitutional discrimination, the discrimination must be "intentional or purposeful," Snowden v.

Hughes, 321 U.S. 1 (1944).

In this case, in reversing the trial court's finding of discriminatory prosecution, the Ohio Supreme Court reasoned that the defendant had failed to sustain their burden of establishing a prima facie case of unconstitutional discriminatory prosecution because they failed to present evidence that Hustler alone would be prosecuted.

However, it is clear that although a defendant is required to show "purposeful" discrimination to gain relief, malice, in the sense of personal ill-will toward the victim of discrimination, need not be demonstrated. See, Givelber, The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law, 1973 U. Ill. L. Forum 88, 90-96. Discriminatory selection of subjects for prosecution has been equated with prosecution "based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." United States v. Berrios,

501 F.2d 1207, 1211 (2d Cir. 1974).

Moreover, federal appellate courts have recognized that discriminatory enforcement of laws in a manner which curtails First Amendment freedoms is especially pernicious:

> "[T]he Supreme Court has stated, 'It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups whether by the use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibiting statute.'" United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972) (Underscoring added).

See extensive discussion in United States v. Falk, 479 F.2d 616, 622-624 (7th Cir. 1973). See also, United States v. Steele, 461 F.2d 1148 (9th Cir. 1972).

Even though the final burden of persuasion concerning discriminatory enforcement lies with the defendant, recent authority holds that a mere threshhold showing of

discrimination by the defense shifts the burden of going forward to the prosecution. See, e.g., United States v. Falk, 479 F.2d 616, 624 (7th Cir. 1973); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Steele, 461 F.2d 1448 (9th Cir. 1972). The necessity for this approach was suggested in Givelber, The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law, 1973 U. Ill. L. Forum 88, where the author states that:

> "Rather than requiring a defendant to prove the prosecutor's knowledge and motivation in order to establish a denial of equal protection, a court should hold that the burden of going forward shifts to the state once the defendant proves that only a few of the knowable violators of a law have been prosecuted or that the group prosecuted for violating a law differs from the group not prosecuted in characteristics irrelevant to law enforcement purposes. Only after the state explains what has produced the unequal treatment can the court determine whether the selective enforcement results from the application of unjustifiable or arbitrary enforcement criteria." Id., at 106.

Upon similar reasoning, it has been held that "the government, being in possession of the facts...should have come forward with evidence, if it could, to rebut the inference of a double standard." United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972). In review of the City of Cleveland's established previous policy of not prosecuting the magazines similar to Hustler, the observations of the court in United States v. Falk, 479 F.2d 616 (7th Cir. 1973), are particularly relevant:

> "It is, of course, possible that ...the government changes its policy on nonprosecution. However, in view of its admitted policy not to prosecute prior to that decision we believe that in the particular circumstances of the instant case it was incumbent upon the government to come forward with the evidence that it had in fact changed its policy generally or otherwise to explain why Falk was being singled out for prosecution in contravention of the government's own procedures." Id., at 621 (Underscoring added).

The record in this case underscores the difficulty defendants face in proving

unconstitutional discriminatory enforcement of the law. Further, the decisions of the courts below demonstrate the uncertainty and confusion which surrounds the issue of allocating the burden of proof and the burden of presenting evidence in a case where the defense of discriminatory enforcement has been raised.

The record in this case clearly established a more than sufficient basis for an inference of unjustifiable discrimination adequate to shift the burden to the prosecution. The sexual content of Hustler was no more explicit than that of the other magazines of its genre, milder than at least one of the others and Hustler contained articles and features which were not even sexually oriented (see pp. 8-9, supra). Through the testimony, Hustler emerges as a magazine that takes an irreverent attitude toward institutions of government, including national political figures (T. 48), the Statute of Liberty (ibid.), and a prosecutor (T. 65). The prosecution

was admittedly commenced as a result of an irreverent political cartoon (T. 54) and witness Taylor testified that "publicity" and "public reaction" played a part in the process of selection (T. 116-119). Under the circumstances of this case, where First Amendment rights arguably were at stake, and where ample evidence had been presented to raise the inference of discriminatory prosecution, the burden should have shifted to the prosecution to rebut the defendants' evidence, rather than placing the virtually impossible burden upon the defendants to prove through other government officials that Hustler alone would be prosecuted.

Defendants had presented evidence through the Assistant Law Director's testimony that he alone had determined to prosecute Hustler and that he had been delegated the authority to determine what prosecutions to commence during the prior two years. The fact that the witness later urged that other officials would have to make the decision to prosecute

other magazines like Hustler should not alone have defeated the defendants' showing of discriminatory enforcement.

A case such as this, where First Amendment freedoms arguably are at issue, demonstrates the need for guidance from this Court on a question which has been confronted by federal and state courts with greatly different results. Because of the important First and Fourteenth Amendment rights at issue in this case and because resolution of the question presented would be of great benefit to the administration of criminal justice, this Court should accept review of this case.

AN IMPORTANT QUESTION CONCERNING EQUAL PROTECTION OF THE LAW IS PRESENTED WHERE A TRIAL COURT, AFTER WEIGHING THE EVIDENCE PRESENTED, INCLUDING THE CREDIBILITY OF THE WITNESSES, FINDS THAT DISCRIMINATORY ENFORCEMENT HAS BEEN PROVEN, BUT AN APPELLATE COURT REVERSES THAT FINDING BECAUSE OF THE APPELLATE COURT'S REFUSAL TO ACCEPT THE TRIAL COURT'S DETERMINATION OF CREDIBILITY, CONTRARY TO A WELL-SETTLED RULE OF REVIEW.

The appellate courts below held that the

defendants failed to sustain their burden of proof as to the intent to discriminate against Hustler magazine because they failed to present evidence that Hustler alone would be prosecuted. In reaching this conclusion, the appellate courts ignored an equally well-settled principle that a trier-of-facts' determination of the credibility of a witness is entitled to great weight on appellate review. Landis v. Kelly, 27 Ohio St. 567, 571-572 (1875).

In the instant case, the only evidence offered by the defendants or the state was the testimony of witnesses Taylor and Nemeckay. The trial court, sitting as trier-of-fact, was able to observe the reactions of the witnesses while they were questioned and to hear the inflection and emphasis given to words and phrases by the witnesses. Because the two witnesses were the very persons who were closely involved in prosecuting Hustler, they could not be expected to offer direct admissions of discriminatory prosecution.

The credibility of their answers was directly at issue. Therefore, the trial court's task was especially demanding and its acceptance and rejection of the witnesses' answers on the basis of credibility should have been accepted on appellate review. As the trier of fact, the trial judge was obliged to determine whether the motive of the prosecutor was unfairly to single out Hustler for a discriminatory purpose; and since there is ample evidence to support that conclusion, the judgment of the trial court should not have been reversed. Indeed, Justice Brown, in his dissent from the decision of the Ohio Supreme Court, sharply criticized the court for selective adoption of testimony.

In a case in which discriminatory enforcement against controversial public figures has been alleged and found to exist, an appellate court's refusal to accept the trial court's determination of credibility of testimony of a witness violates the defendants' rights to equal protection of the law where

the rule of deference to determinations of credibility has been followed in other less notorious cases.

Because of the importance of the question presented herein, this Court should accept review of this case.

## CONCLUSION

This case clearly presents a question of great importance to the administration of criminal justice. Not only is a citizen's Fourteenth Amendment right to be free from discriminatory enforcement of the law at issue in this case but also the rights to untrammeled expression of thoughts and opinions, particularly political opinions, guaranteed by the First Amendment to the United States Constitution, are presented.

In this case, a nationally known and distributed men's magazine was singled out for prosecution under Ohio's obscenity statutes because the magazine promoted its political opinions in a manner which offended

an assistant law director of the City of Cleveland and a few other members of the community. The trial court below, after listening carefully to the testimony which was presented, reasonably concluded that there was discriminatory enforcement of the Ohio obscenity laws in violation of the defendants' constitutional rights to equal protection and free speech. However, on review, the appellate courts in a case where unconstitutional restraint of free speech was presented, placed the impossible burden upon the defendants of presenting plenary proof of the City's policy concerning prosecution of men's magazines, rather than properly shifting the burden to the prosecution to rebut what was rtainly a prima facie showing of discriminary enforcement.

In sum, what hangs in the balance is a citizen's ability to vindicate his right to free expression where a discriminatory prosecution has been brought in an attempt to silence him. Therefore, this Court should

accept this case for review to clarify the procedure to be employed where a defense of discriminatory enforcement has been made. Upon review, this Court should reverse the judgment of the Ohio Supreme Court and affirm the judgment of the Cleveland Municipal Court.

Respectfully submitted,

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# APPENDIX

OPINION OF THE OHIO SUPREME COURT

THE STATE OF OHIO, APPELLEE,
v. FLYNT ET AL., APPELLANTS.

(No. 79-556--Decided July 16, 1980.)

APPEAL from the Court of Appeals for Cuyahoga County.

On July 14, 1976, complaints were issued against defendants-appellants, Larry C. Flynt, Jimmy R. Flynt and Althea Leasure Flynt, for allegedly pandering obscenity in violation of R. C. 2907.32(A)(2), complicity in violation of R. C. 2923.03(A)(2) and personal accountability for organizational conduct in violation of R. C. 2901.24(A)(1). The complaints alleged that the defendants, as officers, agents or employees of Hustler magazine, caused, or permitted, the exhibition or dissemination of materials known to be obscene, to wit, the July and August, 1976, issues of Hustler magazine.

The defendants moved to dismiss the complaints on the basis that they were discriminately prosecuted, in contravention of the Equal Protection Clause of the Fourteenth Amendment. The trial court granted an

evidentiary hearing on the motion, whereupon the following facts were elicited, primarily from Bruce A. Taylor, the assistant law director for the city of Cleveland. Taylor had been in charge of the city's obscenity prosecution when these complaints were issued.

It was testified that since Spring of 1973 the city of Cleveland had initiated between 500 and 550 obscenity prosecutions. The materials selected for prosecution were largely determined in accordance with instructions given by Taylor to police officers, although the officers were given considerable latitude to exercise their own discretion. The instructions provided that applicable Supreme Court decisions proscribed the sale of "obscenity which is hard-core." "Hard-core" was understood to encompass "actually instead of simulated acts of sex." The officers were further instructed to seize the "most explicit of the material available." Enforcement therefore concentrated on "adult

book-stores and theaters." There was also testimony that certain materials which may not have contained "actual sexual contact" were, nevertheless, seized and prosecuted. It was conceded by Taylor, that "[w]e nad never prosecuted a magazine like Hustler."

Further testimony revealed that the police department received complaints about the July 1976 issue of Hustler, and, in particular, a cartoon depicting sexual activity between prominent political figures and the Statute of Liberty. An investigation ensued, whereupon a copy of the issue was brought to Taylor, who subsequently decided to initiate action against the magazine.

Taylor asserted that Hustler was prosecuted as a test case. Other magazines of a similar nature had been under investigation for eight months without being prosecuted. He conceded that such an extended investigation was unusual. When questioned why he did not prosecute these magazines, Taylor stated that he was "waiting for this case."

When he was asked whether further prosecutions would follow, should he receive a favorable decision in this case, Taylor responded, "I don't know. That decision I can't make alone either" but "[i]t's being discussed."

On the basis of this testimony and the testimony of a Cleveland police officer working obscenity cases, the trial judge determined that the defendants were prosecuted discriminatorily, in violation of the Fourteenth Amendment, and dismissed the complaints. The Court of Appeals reversed, holding that the defendants failed to sustain their burden of proof.

The cause is now before this court upon the allowance of appellants' motion to certify the record.

Ms. Almeta Johnson, chief police prosecutor, and Mr. Bruce A. Taylor, for appellee.

Messrs. Berkman, Gordon, Kancelbaum, Levy & Murray, Mr. Bernard A. Berkman, Mr. George W. Palda, Mr. Herald Price Fahringer and Mr. Paul J. Cambria, Jr., for

appellants.

Per Curiam. The law is well settled that the government is subject to constitutional restraints in its choice of those whom it may prosecute. As long ago as Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-74, the United States Supreme Court stated that although a "law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights," there is a denial of equal protection of the laws.

The conscious exercise of some selectivity in enforcement is not in itself, however, a violation of the United States Constitution. Oyler v. Boles (1962), 368 U.S. 448, 456. In order for selective enforcement to reach the level of unconstitutional discrimination the discrimination must be

"intentional or purposeful." Snowden v. Hughes (1944), 321 U.S. 1, 8. This concept of "intentional or purposeful discrimination" was explained in United States v. Berrios (C.A. 2, 1974), 501 F.2d 1207, 1211, as follows:

"To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at lease prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.'" This test has been recognized by numerous

courts. See United States v. Murdock (C.A. 5, 1977), 548 F.2d 599, 600; United States v. Ojala (C.A. 8, 1976), 544 F.2d 940, 943; United States v. Legget & Platt, Inc. (C.A. 6, 1976), 542 F. 2d 655, 658, certiorari denied, 420 U.S. 945 (1977); United States v. Bourque (C.A. 1, 1976), 541 F. 2d 290, 292-293; United States v. Peskin (C.A. 7, 1975), 527 F. 2d 71, 86, certiorari denied, 429 U.S. 818 (1976); United States v. Scott (C.A. 9, 1975), 521 F. 2d 1188, 1195, certiorari denied, 424 U.S. 955 (1976).

Applying these principles to the instant cause it must be conceded that defendants demonstrated that other magazines with a format similar to Hustler, sold in the same stores as that magazine, were not yet being prosecuted, although the authorities were aware of their existence and general content. There are, however, several legitimate reasons testified to at trial as to why Hustler

magazine was chosen as a test case.[1] The prosecutor, for example, testified that while it contained a similar format as other magazines on the market, that some portions of Hustler were more offensive than those in the compared magazines. It was also testified that the prosecution of out-of-state magazines would entail greater difficulties in service of process and extradition. The officers of Hustler, on the other hand, were

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1 The validity of pursuing a test case and its relationship to the doctrine of discriminatory prosecution was explored in the case of People v. Utica Daw's Drug Co. (1962), 16 A. D. 2d 12, 225 N.Y. Supp. 2d 128, 136, where it was stated:

"Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found."

domiciled in Ohio.

In addition, the defendants did not establish that Hustler alone would be prosecuted. The prosecutor in this case stated that he did not have the authority to make the decision concerning subsequent prosecutions of other magazines. Testimony from his superiors was necessary to infer that the city of Cleveland would not follow up a successful result in the instant cause with the bringing of additional prosecutions.

The burden on a defendant to show intentional or purposeful discrimination is a heavy one, Berrios, supra, and will not be presumed, Snowden, supra. We hold that the defendants herein did not sustain their burden of establishing a prima facie case of unconstitutional discriminatory prosecution. In order to sustain their burden, the defendants needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions.

Accordingly, the judgment of the Court

of Appeals is affirmed.[2]

Judgment affirmed.

CELEBREZZE, C. J., HERBERT, W. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

PAUL W. BROWN, J., dissenting. I agree with the test used by the majority and I also agree that there is a heavy burden upon the defendants to demonstrate intentional or purposeful discrimination. I would hold, however, that the defendants sustained this burden and that the Court of Appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact in the instant cause.

It is well-settled that in reviewing a decision rendered by a trial court without a jury, a Court of Appeals will indulge in

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Implicit in this court's holding is a rejection of defendants' contention that the Court of Appeals reversed the trial court's dismissal of the complaints in the instant cause, based upon an improper determination of the credibility of the witnesses at trial.

every reasonable presumption in favor of findings made by the court below as a basis for its decision. Beach v. Sweeney (1958), 167 Ohio St. 477. Any fact necessary to sustain the judgment, including reasonable inferences drawn therefrom, must be presumed to have been found by the trial court if evidence was presented in support of such finding. See Brescoll v. Nationwide Mut. Ins. Co. (1961), 116 Ohio App. 537, 543; Thayer v. Shorey (1934), 287 Mass. 76, 191 N.E. 435. The appellate courts in the instant cause have deviated from this principle.

Applying the test used by the majority, governing discriminatory prosecutions, quoted from United States v. Berrios (C.A. 2, 1974), 501 F. 2d 1207, 1211, it is apparent that the first prong of that test is met. The defendants presented evidence, the witness Taylor conceded, and the trial court found,[3]

[3] There are no findings of fact or conclusions of law in the record. There is, however, a document entitled "Memorandum to Attorneys," authorized by the trial judge, indicating some of the factual considerations supporting his decision. Any reference to the trial court's "findings" are derived from this document.

that the city of Cleveland had never before prosecuted a magazine like Hustler, despite the fact that magazines similar to or pictorially "stronger" than Hustler were available within the community. Although Taylor justified this as a test case, there was substantial evidence indicating the contrary. Lengthy investigations of similar magazines were dropped without taking even preliminary steps toward prosecution. Taylor's attempted justification, i.e., that he was awaiting the outcome of this case, was contradicted by his subsequent testimony concerning the likelihood of general enforcement in the future if he received a favorable judgment in the case. When asked whether he would then pursue other magazines of this type, Taylor testified that the decision was subject to approval from his superiors--this, despite the fact that by his own admission, Taylor possessed the exclusive delegated authority to select which cases to prosecute and he alone had made the decision to pursue Hustler.

Furthermore, the evidence strongly indicated that this prosecution was initiated, not to clarify the status of obscenity laws, but rather in response to public reaction to political cartoons.

In light of the trial court's express rejection of the test case rationale, the majority, by selectively adopting testimony supportive of finding this prosecution to be a test case and rejecting evidence to the contrary, improperly impinged on the trial court's prerogative as trier of fact to weigh the evidence and evaluate the credibility of the witnesses. A prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, where the evidence clearly demonstrates that to the contrary a discriminatory intent is present.

As to the second prong of the Berrios test, i.e., that the discriminatory selection is invidious or in bad faith if based upon impermissible considerations, substantial evidence was presented to establish that the

prosecution was initiated (1) on the basis of public sentiment and (2) for the purpose of inhibiting First Amendment rights. Either motivation, standing alone, would be a sufficient basis for a finding of invidious selection or bad faith.

Taylor explained that he would need to consult his superiors concerning future prosecutions of magazines similar to Hustler because of publicity surrounding obscenity prosecutions. Taylor stated that public reaction was a legitimate consideration in obscenity cases because strong public interest impeded the speedy disposition of these cases and because public response was a barometer of the community's perception of obscenity. The trial court properly took exception to these proffered justifications as a basis for selecting cases to prosecute. The judge noted that the progress of a trial is not a function of attendant publicity, nor should public reaction be used as an index to the community's ideas as to what constitutes

obscenity; such a determination being within the domain of a jury. A reasonable inference to be drawn from this testimony, and one which the trial court apparently drew,[4] is that the defendants were prosecuted on the basis of unfavorable public sentiment. Upon this evidence the trial court could reasonably have found that this prosecution was initiated in "bad faith," i.e., that it was grounded upon an arbitrary standard to pursue only those whom the public held in disfavor. As the court noted in United States v. Torquato (C.A. 3, 1979), 602 F. 2d 564, 568:

"***To permit criminal prosecutions to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting

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The court asked witness Taylor:

"Mr. Taylor, are you sitting here telling this court that if someone makes a determination that there is a violation of the criminal section of the statute, or the city of Cleveland, that you first determine what the public feels about it before you proceed***?"

the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias." It is our obligation to prevent such personal abuses of governmental power.

There are also indications that the prosecution was brogh to chill the defendants' First Amendment rights. There was strong evidence that the prosecution was initiated on the basis of the political cartoon depicting sexual activity between political figures and the Statute of Liberty (as well as the cartoon displaying Uncle Sam with his pants down). This was admitted during the course of a television interview and at the hearing, although Taylor subsequently attempted to retract and qualify these statements. Taylor conceded that the cartoon was "the most protected thing in the whole magazine." He could hardly argue otherwise, in light of Papish v. Univ. of Missouri Curators (1973), 410 U.S. 667, wherein the

United States Supreme Court held that a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice was not constitutionally obscene. This testimony alone served as an independent basis for the trial court to find bad faith through the inhibition of First Amendment rights.

I conclude that having made a proper showing of discriminatory prosecution, the defendants are entitled to discharge. Such a determination in no way reflects upon the guilt or innocence of the defendants.[5] If,

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5 "The question is***whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single class of defendants for prosecution because of personal animosity or some other illegitimate reason. The wrong sought to be prevented is a wrong by the public authorities. To allow such arbitrary and discriminatory enforcement of a generally disregarded law is to place in the hands of the police and the prosecutor a power of the type frequently invoked in countries ruled by a dictator but wholly out of harmony with the principle of equal justice under law prevailing in democratic societies. The court is asked to stop the prosecution at the threshold, not because

and when, the public authorities decided to undertake a generalized enforcement of the law, the defendants could again be charged.

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the defendant is innocent but because the public authorities are guilty of a wrong in engaging in a course of conduct designed to discriminate unconstitutionally against the defendant." People v. Utica Daw's Drug Co. (1962), 16 A.D. 2d 12, 21, 225 N.Y. Supp. 2d 128, 133.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 38079

STATE OF OHIO

APPELLANT

-vs-

LARRY C. FLYNT,
ET AL.

APPELLEES

APPEAL FROM

CLEVELAND MUNICIPAL COURT

No. 76 CRB 16688,
16687 & 16689

JOURNAL ENTRY
AND OPINION

DATE FEB 8 1979

KRENZLER, P.J.:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done by the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

On July 14, 1976, complaints were issued against the defendant-appellees Larry C. Flynt, Jimmy R. Flynt, and Althea Leasure in the Cleveland Municipal Court, alleging violations of R.C. 2907.32(A)(2) governing the pandering of obscenity.[1] The complaints alleged that the appellees were officers, agents, or employees of Hustler Magazine. The offenses charged were based upon the July and August, 1976 issues of that publication.

The appellees moved to dismiss the complaints upon the ground of discriminatory prosecution. Although a copy of the motion is not contained in the record before this court on appeal, a hearing on the motion was

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1 R.C. 2907.32(A) provides in part:

"No person, with knowledge of the character of the material or performance involved, shall do any of the following:

* * *

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material...."

held by the trial court on February 28, 1977. On May 17, 1977, the appellees' motion to dismiss was granted, and the appellees were ordered discharged.

The appellant, State of Ohio, is appealing from the trial court's decision granting the appellees' motion, and assigns the following error:

> THE SELECTION OF "HUSTLER" MAGAZINE FOR OBSCENITY PROSECUTION IS NOT AN EXERCISE OF UNCONSTITUTIONAL DISCRIMINATION.

At the hearing below, the principal witness for the appellees was Bruce A. Taylor, Assistant Director of Law with the City of Cleveland and the prosecutor assigned to prosecute obscenity cases. Mr. Taylor testified that he had been on this assignemnt for two years, ever since becoming an attorney. Since 1973 there had been approximately 500-550 obscenity arrests in Cleveland, and of this total, one-half to two-thirds involved films and the remainder involved magazines.

Mr. Taylor stated that written guidelines had been developed for the police

department three to four years earlier to guide them in making arrests for obscenity. He testified that he had never relied on these guidelines, and that police officers were concentrating on "mostly hard-core meaning actually [sic] instead of simulated acts of sex, and where ejaculation, et cetera, is shown." (Tr. 14). He did not know whether the written guidelines on obscenity arrests were still controlling, and testified that he had never seen them. He had instructed police to concentrate on "more explicit" as opposed to "less explicit" materials.

To Mr. Taylor's knowledge, there had been no prosecutions of publications involving only written material. To his knowledge there had been only two prosecutions involving materials, such as Hustler, not depicting explicit sexual activity.

Regarding the prosecution of Hustler, Mr. Taylor testified that a copy of the July issue of that magazine had been sent to the Cleveland Police Department, and that several

complaints were made regarding a cartoon depicting prominent political figures engaged in sexual activity with the Statute of Liberty. The police officers brought the magazine to Mr. Taylor, who examined its overall content. He stated that while the cartoon was "one of the reasons they were prosecuted" it was not "one of the reasons they were charged." He also stated that in his opinion the magazines were legally obscene.

He also stated that the city had never prosecuted a magazine like Hustler, and that this was the first prosecution of a magazine having a second-class mailing privilege and nationwide distribution. A number of "men's magazines" had been under investigation for eight months, but no prosecutions had been initiated.

At this point in the hearing, the following dialogue took place:

> Q. All right. And is that unusual to have a magazine under investigation for eight months without initiating an investigation, in your experience

here as a prosecutor?

A. Well, it's unusual -- this is the first time it has happened because we're waiting for this case.

Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud --

A. I don't know. That decision, I can't make alone either.

Q. But I take it it's been contemplated?

A. It's being discussed. (Tr. 92)

Mr. Taylor stated that the other men's magazines referred to by appellees' counsel were comparable to Hustler.

Officer Steven Nemeckay of the Cleveland Police Department Obscenity Detail testified that he had purchased the two issues of Hustler upon which the prosecution was based at the instruction of Mr. Taylor. The issues were taken to several judges, and their determination regarding its contents led to the filing of the complaints.

Subsequently, the order of dismissal based on discriminatory prosecution was entered, and the state brought this appeal.

The question presented by this appeal is whether the appellees made a proper showing of discriminatory prosecution so as to entitle them to discharge.

It is well settled that upon a proper showing of discriminatory prosecution a criminal defendant is entitled to discharge. The principle of law underlying such a discharge is that although a statute or ordinance may be fair and impartial on its face, the equal protection clause of the Fourteenth Amendment prohibits the application and administration of such laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights." Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-74. In Yick Wo v. Hopkins, supra, the Supreme Court overturned the petitioners' convictions on the ground that

the prosecutions against them were based solely on their race and nationality.

Where a claim of discriminatory prosecution is considered, the standard to be followed is whether the selection of the defendant for prosecution "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles (1962), 368 U.S. 448; State v. Wolery (1976), 46 Ohio St. 2d 316, cert. denied 429 U.S. 932. See also State v. Steurer (1973), 37 Ohio App. 2d 51; Annot., 4 A.L.R. 3d 404.

In a leading case in this area of the law, it was stated that the question to be answered is "whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or for some other illegitimate reason. The wrong to be

prevented is a wrong by the public authorities." People v. Utica Daw's Drug Co. (1962), 16 App. Div. 2d 12, 17-18.

While the doctrine of discriminatory prosecution is well established, it should not be equated with mere selectivity in prosecution, without a concomitant showing of deliberate discrimiantion based on an unjustifiable standard. Taken alone, the conscious exercise of some selectivity in enforcement is not a federal constitutional violation. Oyler v. Boles, supra at 456. See State v. Wolery, supra. Accordingly, the Ohio Supreme Court has noted the "discretion vested in a public prosecutor to exercise selectivity in the enforcement of criminal statutes." State v. Wolery, supra at 325. The burden of proving conscious, intentional discrimination is upon the defendant and is a heavy one. People v. Utica Daw's Drug Co., supra at 19.

The bounds of prosecutorial discretion to selectively prosecute offenders was

examined at some length in People v. Utica Daw's Drug Co., supra. In that case, the court pointed out that such selectivity may be justified where "the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity." Id. at 21. Such a method of prosecution "may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary." Id. It is clear that the prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, or an attempt to make an example, where the evidence clearly demonstrates to the contrary that a discriminatory intent is present. Nevertheless, "[i]t is only when the selective inforcement is designed to discriminate against the persons prosecuted, without any

intention to follow it up by general enforcement against others, that a constitutional violation may be found." Id.

Applying the above principles to the instant case, it is clear that the appellees demonstrated that other "men's magazines" with a format similar to Hustler were not yet being prosecuted. It was also shown that such magazines were being sold in the same sort of stores as Hustler, and that the authorities were aware of their existence and general content.

At the same time, the prosecutor who testified at trial stated that the prosecution of Hustler was a test case. Although the magazine was brought to the attention of public authorities in part because of an offensive cartoon, the prosecutor provided several reasons why Hustler was chosen for a test case. First, he maintained that while it contained essentially the same format as other magazines, some portions were more offensive than those in similar magainzes.

Second, he stated that to his knowledge, prosecution of officers of out-of-state magazines would at the least entail greater difficulties of service of process and extradition. The officers of Hustler, on the other hand, were domiciled in Ohio.

Also, taking the testimony from the hearing below in context, the testimony of Mr. Taylor, an assistant Director of Law, was not sufficient to meet the appellees' burden of proof as to intentional discrimination. In particular, he stated that he was not in a position to make the decision of whether the other "men's magazines" under investigation would be prosecuted if the Hustler prosecution were successful:

> Q. Is it your intentions [sic], that if this case were to be prosecuted, successfully, you would go after Penthouse, Playboy, Oui, Gallery, Genesis, Stud --
>
> A. I don't know. That decision, I can't make alone either. (Tr. 92)

If Mr. Taylor had stated that he was in

a position to decide whether to prosecute the other publications, his testimony that they had not yet been prosecuted would perhaps be some evidence of discriminatory intent. Absent testimony from his superiors, however, there was no reliable basis upon which the trial court could infer that the City of Cleveland would not follow up a successful result in the Hustler case with additional prosecutions. Taking the testimony of Mr. Taylor alone, on the other hand, the court had before it no substantial evidence to support a conclusion that Hustler alone would be prosecuted, much less that this selectivity was based on constitutionally prohibited discrimination. Accordingly, in order to sustain their burden, the appellees should have at least presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format. Such testimony might have provided a reliable basis for a conclusion that discriminatory intent was

indeed present. Absent such testimony, we must conclude that the appellees did not present evidence of such quality to sustain their burden of proof as to the intent underlying the decision to prosecute Hustler.

Our conclusion should be viewed in light of the fact that the burden of proving conscious discriminatory intent is upon the defendant and is a heavy one. People v. Utica Daw's Drug Co., supra. Also, as discussed earlier, selectivity in prosecution alone is not sufficient to demonstrate a constitutional violation absent a showing that the prosecution is based on an unjustifiable standard or arbitrary classification. See, e.g. Oyler v. Boles, supra.

Examination of the transcript of testimony from the hearing below fails to reveal that the Hustler prosecution was based on any deliberate discrimination involving an arbitrary classification. The selection of Hustler for a test case, in fact, was based on sever l rational factors differentiating

it from magazines of the same format. Accordingly, we hold that the court below erred in dismissing the case based on the doctrine of discriminatory prosecution, and that the appellant's assignment of error is well taken.

The order of the trial court granting the appellees' motion to dismiss is reversed and the case remanded for further proceedings.

This cause is remanded to the Cleveland Municipal Court for further proceedings.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure, Exceptions.

PRYATEL, J.

PATTON, J., CONCUR

/s/Alvin I. Krenzler
PRESIDING JUDGE
ALVIN I. KRENZLER

Appearances:

For Plaintiff-Appellant: Almeta A. Johnson

For Defendant-Appellees: Bernard A. Berkman

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

State of Ohio — Court of Appeals No. 48079

Appellant — Lower Court No. Cleve. Muni. Ct. 76. CRB 16688, 76 CRB 16687 16689

-vs-

Larry C. Flynt, et al. — Motion No. 43219

Appellees

Date MAR 2 1979

JOURNAL ENTRY

Motion by appellee for reconsideration overruled. Exc.

KRENZLER, P. J.,

PRYATEL, J., CONCURS

PATTON, J., NOT PARTICIPATING

/s/Alvin I. Krenzler
Presiding Judge
ALVIN I. KRENZLER

IN THE CLEVELAND MUNICIPAL COURT

CUYAHOGA COUNTY, OHIO

Case Nos. 76 CRB 16687 A & B
76 CRB 16688 A & B
76 CRB 16689 A & B

STATE OF OHIO X

Plaintiff X (Judge Salvatore R. Calandra)

-vs- X

JIMMY R. FLYNT X
LARRY C. FLYNT
ALTHEA LEASURE FLYNT X

Defendants X

MEMORANDUM TO ATTORNEYS

The defendants have filed multiple motions seeking dismissal of the charges. Briefs have been filed and argued during two lengthy hearings.

Several rulings have been made by this Court prior to this date. The Court has ruled that Section 2907.32 of the Ohio Revised Code which defines the crime of pandering obscenity is constitutional. Further, the Court has ruled that the two issues of the magazine are obscene as a matter of law and not entitled to protection under the First Amendment.

The Court directs its attention now to defendants' motion to dismiss on the ground that the complaints represent selective and discriminatory prosecution and therefore violate the equal protection provisions of the Fourteenth Amendment.

The testimony of the Assistant Prosecutor, whose basic duty is the prosecution of obscenity cases, was that guidelines had been established as to what matters were to be prosecuted; that these guidelines were solely concerned with the hard core pornography; that the only prosecutions to date were for publications violative of these hard core pornograph guidelines; that the magazines presented to date were sold solely in "Adult" bookstores; that there were other magazines, available generally throughout the community, which contained some hard core material; that none of these magazines were the subject of any prosecution; that the magazine in question did not contain hard core material and that magazines, similar to the magazines

in question, available at the same location and in the same manner as this magazine, had not and were not being presented.

The Court does not take into consideration that this is the first prosecution of this type of magazine or of this type of defendants. However, the Court must take into consideration that not only is this the first but it is also the only such prosecution and that no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case in July of 1976.

While varied essential elements need be present for the successful prosecution of the crime of pandering obscenity, whether it be by a corporation or an individual, the basic issue is the obscenity of the periodical. If it is obscene, then whoever sells, distributes or publishes it is subject to prosecution. If there are, as the evidence clearly indicates, other magazines, similar in content to the magazine in question, then to

select and prosecute this magazine and this magazine only, presents a serious constitutional question. It is legally insufficient for the City to argue that it is awaiting the result of this case to determine its further course of action.

While this Court certainly disagrees with some of the conclusions and interpretations recited by the prosecutor, as to whom and what to prosecute, for the purposes of this motion this Court is limited by that testimony and must search that testimony objectively in relationship to the constitutional guidelines established by a series of previous judicial decisions on the discriminatory prosecution question.

It is this Court's decision that the testimony supports the allegations of the defendants. The motion will be granted and the charges will be dismissed against these defendants.

/s/Salvatore R. Calandra
SALVATORE R. CALANDRA, Judge
Cleveland Municipal Court
Courtroom #11, City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
621-6345

IN CLEVELAND MUNICIPAL COURT

Criminal Branch

No. 76 CRB 16688 A & B

THE STATE OF OHIO )
County of Cuyahoga ) ss.
City of Cleveland )

City of Cleveland )
)
vs. )
)
Larry Flynt )

Affidavit filed, warrant issued and return made. 5-17-77

Motion to dismiss granted, defendant discharged.

IN CLEVELAND MUNICIPAL COURT

Criminal Branch

No. 76 CRB 16687 A & B

THE STATE OF OHIO )
County of Cuyahoga ) ss.
City of Cleveland )

City of Cleveland )
)
vs. )
)
Jimmy Flynt )

Affidavit filed, warrant issued and return made. 5-17-77

Motion to dismiss granted, defendant discharged.

IN CLEVELAND MUNICIPAL COURT

Criminal Branch

No. 76 CRB 16689 A & B

THE STATE OF OHIO )
County of Cuyahoga ) ss.
City of Cleveland )

City of Cleveland )
)
vs. )
)
Althea Leasure )

Affidavit filed, warrant issued and return made. 5-17-77

Motion to dismiss granted, defendant discharged.

...

## CONSTITUTION OF THE UNITED STATES

### FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## OHIO REVISED CODE

§2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse, fellatio, and cunnilingus between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juvelines," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or

brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicy disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

PROPOSITION OF LAW PRESENTED
TO THE OHIO SUPREME COURT

In a criminal prosecution for the distribution of materials which are arguably protected by the First Amendment of the United States Constitution, where the defendant has presented a prima facie case of unconstitutional discriminatory prosecution, the State then has the burden of rebutting the prima facie showing to avoid a finding of discriminatory prosecution.